Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-921

STATE OF OHIO,

Petitioner,

vs.

RICARDO SMITH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

SIMON L. LEIS, JR.
Prosecuting Attorney

LEONARD KIRSCHNER
Assistant Prosecuting Attorney

THOMAS P. LONGANO
Assistant Prosecuting Attorney

JOSEPH G. CARR
Assistant Prosecuting Attorney

420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202

Attorneys for Petitioner

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

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IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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OPINIONS BELOW

The June 13th, 1979 opinion of the Ohio Supreme Court for which a Motion for Rehearing was denied on September 13th, 1979 (Appendix "A") is set forth in Appendix "B" of our brief. The opinion of the Court of Appeals of the First Appellate District of Ohio is set forth in Appendix "C".

JURISDICTION

On September 13th, 1979 the Supreme Court of Ohio denied a Motion for Rehearing of their opinion of June 13th, 1979 which held that where a witness has testified at a preliminary hearing against a defendant and has been

cross examined by the defendant's counsel at the preliminary hearing, such testimony may not be used in the subsequent trial of the defendant if the witness is unavailable as being in violation of the Sixth Amendment to the Constitution of the United States.

Jurisdiction is pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY AND OHIO SUPREME COURT RULES PROVISIONS INVOLVED

SIXTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

SECTION 2945.49, OHIO REVISED CODE

Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony.

RULE IX, SECTION 2, OHIO SUPREME COURT RULES OF PRACTICE

Ten days after the announcement of a decision on the merits, unless a motion for a rehearing is filed, the Clerk shall issue a mandate in conformity to the entry of the Court. If a motion for a rehearing is filed and denied, the mandate shall issue at the same time as the decision on the motion for rehearing. No mandate shall issue on a denial of a motion to certify or a motion for leave to appeal, or upon the sustaining of a motion to dismiss an appeal as one not involving a substantial constitutional question.

QUESTION PRESENTED

Where a witness who is not available for trial and cannot be located has testified at a preliminary hearing at which the defendant was present and was represented by counsel at that preliminary hearing and where the right of full confrontation was available, although the witness was not fully cross examined, does the confrontation clause of the Sixth Amendment to the United States Constitution bar the use of said witness's recorded testimony?

STATEMENT OF THE CASE

The defendant was arrested on September 5th, 1976 for the crime of rape. He had a preliminary hearing on September 10th, 1976 at which time he was represented by legal counsel and was given the full opportunity of cross examination at said preliminary hearing. At that hearing the prosecuting witness testified and was cross examined by counsel for the defendant. The defendant was subsequently indicted by the Grand Jury for the crime of rape. The trial commenced on December 3rd, 1976 before a jury. The victim and prosecuting witness's whereabouts as of the date of the trial was unknown and she could not be located at that time. Under the provisions of Ohio Revised Code 2945.49 her previous testimony at the preliminary hearing was offered and accepted by the Court as evidence against the defendant. Prior to the acceptance of said evidence the prosecutor gave a statement to the Court to reflect that the witness's whereabouts were unknown and to show that an effort had been made to locate the said witness and to bring her before the Court to testify against the defendant. The defendant was sentenced on January 31st, 1977 to a term of not less than 4 years nor more than 25 years to the Ohio Reformatory as provided under the Ohio Statutory law.

A timely appeal was filed to the Court of Appeals of the First Appellate District who rendered their decision on February 8th, 1978 affirming the conviction of the defendant.

The Supreme Court of Ohio on June 13th, 1979 by a 4 to 3 decision (one judge on the majority was sitting by designation as the regular judge was not available) reversed and remanded the case on the basis that (1) the prosecutor had not properly qualified the introduction of

said testimony; and, (2) the defendant's rights under the Sixth Amendment to the United States Constitution were violated by the introduction of testimony of the prosecuting witness which was the record of her testimony at the defendant's preliminary hearing at which time the defendant was represented by legal counsel and afforded the full opportunity of cross examination of the said witness. A Motion to Reconsider (which motion delayed the effective date of the opinion and decision) was timely filed and the Ohio Supreme Court overruled that motion on September 13th, 1979. This Petition for Certiorari to the Supreme Court of Ohio was from that decision.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

The Supreme Court of Ohio reversed and remanded the case on two basis which were:

(1) The oral statements of the Prosecuting Attorney to the Court as to why the witness was not available was insufficient even though not objected to by defense counsel and the requirements of Ohio Revised Code 2945.49 mandated the presentation of evidence from the witness stand under oath.

(2) The testimony of a witness, given at a prior hearing, where the defendant is present and represented by counsel and has the opportunity for full cross examination, may not be admitted in a subsequent trial against said defendant when said witness is unavailable and cannot be located as being in violation of the Sixth Amendment to the United States Constitution.

We submit that we are not disputing the right of the Supreme Court of Ohio to interpret their statutes and to require the presentation of evidence under oath from the witness stand as to the unavailability of the witness.

We are disputing the statement in the mandate which reaffirms the Ohio Supreme Court's ruling in *State of Ohio* v. *Roberts,* 55 O.S. (2d) 191 (1978), and for which this Court granted certiorari under case 78-756 of the October Term, 1978. It is our understanding that briefs have been filed and the case of *State* v. *Roberts* (supra) is currently awaiting argument before this Court.

Under the provisions of the Ohio Rules of Criminal Procedure a defendant has the "full right of cross examination" of witnesses presented against him in the preliminary hearing[1] which hearing is a judicial hearing.

The Ohio Rules of Criminal Procedure further mandate that the evidence presented at the preliminary hearing shall be "substantial credible evidence".[2]

As can be seen the Ohio Rules of Criminal Procedure raise the dignity of the preliminary hearing judicial proceeding to one of almost a full fledged trial at which the defendant is represented by counsel and has the full opportunity of cross examination and any decision by the Court must be based upon "substantial credible evidence".

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[1] Ohio Criminal Rule 5(B)(2)
"At the preliminary hearing . . . the defendant and the judge have the full right of cross examination . . . . the hearing shall be conducted under the rules of evidence prevailing in criminal trials generally."

[2] Ohio Rules of Criminal Procedure Rule 5(B)(5)
"Any finding requiring the accused to stand trial on any charge shall be based solely on the presence of substantial credible evidence thereof . . ."

The meaning of confrontation in its main aspect is merely another term for cross-examination. The right to confront a witness is the right to have the opportunity to cross-examine that witness. Confrontation may as an incidental matter also provide for the observation of the witness' demeanor as a minor means of judging the value of his testimony. This minor advantage is not regarded as essential and is dispensed with when it is not feasible. *5 Wigmore on Evidence 28, Section 1365 (Chadbourne Ed. 1974).*

This minor or secondary advantage is a result which accidentally became associated with the process of confrontation. The basic and fundamental object of confrontation is the right to cross-examination. *Wigmore, supra, 154 Section 1396.*

It seems to be well established that the former testimony of an absent witness has almost unanimously been received into evidence by the Courts in this country where it is offered against the accused in a criminal proceeding without violating constitutional rights. This has been so held where the right of cross-examination has been satisfied. *Wigmore, supra, 185 Section 1398.*

It appears that demeanor is such a minor incident of the right of confrontation as not to pose itself as an obstacle at all. The former testimony given to a jury is admissible at a later trial even though the witness is not present and even though his demeanor is not observable at the subsequent hearing.

As early as 1895 this Court in the case of *Mattox* v. *United States,* 15 S.Ct. 337 (1895), dealt with the admissibility of a government witness' prior recorded testimony at a second trial where the witness died after the first trial but before the second.

The court in *Mattox,* supra, held that the authority in favor of the admissibility of such prior recorded testimony where given before a committing magistrate or upon a former trial is overwhelming. The Court also considered the use of a deceased witness' testimony given at a preliminary examination and observed that prior cases have held that the right of cross-examination having once been exercised it was no burden upon the defendant to permit the testimony of the deceased witness to be read to the jury. The court pointed out that consideration must be given to public policy and the necessities of the case. The rights of the public should not wholly be sacrificed in order that an incidental benefit may be preserved to the defendant.

The Court in *Mattox,* supra, went on to state at page 340:

> ". . . A technical adherence to the letter of a constitutional provision may occasionally be carried further than is necessary to the just protection of the accused, and further than the safety of the public will warrant. For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination, or cross-examination, nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony."

It cannot be argued that the Constitutional right to confrontation requires that no hearsay evidence can ever be introduced. *Dutton* v. *Evans,* 91 S. Ct. 210 (1970). This type of evidence should be admissible despite the absence of the witness based upon the theory that the evidence possesses the indicia of reliability. *California* v. *Green,* 90 S.Ct. 1930 (1970), citing *Dutton,* supra.

The Court in *Green,* supra, seemed to rely upon the fact that where testimony is given at a preliminary hearing it is given under circumstances much the same as surround a trial. Namely, the witness is under oath, defendant is present and represented by counsel, the opportunity to cross-examine is present and the hearing is conducted before a judicial tribunal.

Rule 804 of the Federal Rules of Evidence much the same as Ohio's statute permits the introduction at trial of a witness' former testimony where the declarant is unavailable to testify at the time of trial.

The Ninth Circuit Court of Appeals in the case of *Turner* v. *Craven,* 475 F.2d 769 (9th Cir. 1973), held admissible the testimony given by the victim of the crime at a preliminary hearing where she was subject to cross-examination and where she was unavailable to testify at trial because of her mental and physical state.

In the case of *United States* v. *Bell,* 500 F.2d 1287 (2nd Cir. 1974), the Court held that the use of prior recorded testimony at a suppression hearing of an identifying witness who was not present at trial because of illness was proper where prior testimony was on same issue for which it was offered at trial. In the first instance it is generally up to the trial judge to decide if a witness is unavailable. In citing a long chain of authority the court concluded its decision by stating: "the law is clear that prior testimony may be admitted when given – as here– in court, under oath subject to cross-examination and on the very issue for which it was offered at trial."

In the case of *United States* v. *Allen,* 409 F.2d 611 (10th Cir. 1969), the defendant appeared at a preliminary hearing where the opportunity for cross-examination was full, complete and unrestricted. Over objection of the

defendant the trial Court received into evidence the transcript of a co-defendant's testimony given at the preliminary hearing. Without this evidence the case against the defendant was insufficient to sustain a conviction. The Court held:

> "The argument is that because of this fundamental difference the cross-examination of a prosecution witness at a preliminary hearing is less searching into the merits and hence does not satisfy the demands of the confrontation clause. We believe that the test is the opportunity for full and complete cross-examination rather than the use which is made of that opportunity . . ."
>
> ". . . The extent of cross-examination, whether at a preliminary hearing or at a trial, is a trial tactic. The manner of use of that trial tactic does not create a constitutional right. To paraphrase Pointer the statements of the witnesses were made 'at a fullfledged hearing' with accused present and represented by counsel who was given a 'complete and adequate opportunity to cross-examine.' "

In considering the argument that use of the transcripts does not disclose the demeanor of the witness the court in *Allen,* supra, states at page 613:

> ". . . If opportunity to observe demeanor is the controlling factor, then transcripts of testimony at a former trial may not be received. The demeanor problem is the same there as it is with the use of transcripts taken at a preliminary hearing."

The Court relied upon the case of *Mattox* v. *United States,* 156 U.S. 237, which held that the use of transcripts taken at a former trial did not present a confrontation or demeanor problem. Public policy permitted the use of transcripts. The Court in *Allen,* supra, concluded its decision by stating:

> "In the case at bar the right of confrontation has been satisfied. The defendant and the witnesses were brought face to face in a judicial proceeding. The witnesses were sworn and the opportunity for cross-examination was complete and adequate. In our opinion the transcripts were properly received."

In regard to the issue of confrontation and demeanor the Eighth Circuit Court of Appeals in the case of *Phillips* v. *Wyrick,* 558 F.2d 489 (8th Cir. 1977), held at p. 495:

> "Although the confrontation privilege encompasses the opportunity both for the defendant to cross-examine a witness and for the jury to observe the witness, the former is an indispensable ingredient while the latter is an incidental advantage which must sometimes give way to considerations of public policy and the necessities of the case . . ."

The Sixth Circuit Court of Appeals in the case of *Harvey* v. *Kropp,* 458 F (2d) 1054 (1972), at page 1507, relied heavily on the opinion of Mr. Justice White in the *Green* case (supra) in which he said at page 1938:

> "We also think that Porters preliminary hearing testimony was admissible as far as the Constitution is concerned wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial. For Porters statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel . . . respondent had every opportunity to cross examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. Porter's statement would, we think, have been admissible at trial even in Porter's

absence if Porter had been actually unavailable, despite good faith efforts to produce him. (399 U.S. 163, 165, 90 S. Ct. 1938.)"

The Sixth Circuit referred to the Michigan Statute, Mich. Comp. L. Ann. Sec. 768.26 (1968), and Mich. Stat. Ann. Sec. 28, 1049 (1954), which is practically on all fours with Ohio Revised Code, Section 2945.49.

The Sixth Circuit found said testimony given at the preliminary hearing to be admissible at the subsequent trial where the statute was in existence at the time the preliminary hearing took place.

CONCLUSION

It is the belief of the petitioner that Ohio Revised Code 2945.49 does not violate the provisions of the Sixth Amendment to the United States Constitution.

Where a defendant has legal counsel at the time of a preliminary hearing and has the full opportunity to cross examine a witness at the preliminary hearing in Ohio, and, where that witness is unavailable and cannot with reasonable diligence be located, a prior recorded transcript of that witness's testimony at the judicially conducted preliminary hearing may be used against the defendant.

We believe that this Court should grant certiorari in this case.

We believe that if this Court does not desire to grant certiorari in this case at this time; then we believe that this Court should hold this case in abeyance pending a decision in the case of *State of Ohio* v. *Herschel Roberts*, #78-756 of the October Term, 1978 which decision will have a substantial impact upon the ruling by this Court in this case.

SIMON L. LEIS, JR.
Prosecuting Attorney

LEONARD KIRSCHNER
Assistant Prosecuting Attorney

THOMAS P. LONGANO
Assistant Prosecuting Attorney

JOSEPH G. CARR
Assistant Prosecuting Attorney

420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202

Attorneys for Petitioner

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

No. 78-437

THE STATE OF OHIO,) 1979 TERM
City of Columbus.) To wit: September 13, 1979

STATE OF OHIO,

Appellee,

vs.

RICARDO SMITH,

Appellant.

REHEARING

(Entered September 14, 1979)

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. . . . . Page . . . .

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 13th day of September, 1979

THOMAS L. STARTZMAN, Clerk.

By /s/ SAM F. ADKINS, Deputy.

APPENDIX B

THE STATE OF OHIO, APPELLEE, *v.* SMITH, APPELLANT.

[Cite as State v. Smith (1979), 58 Ohio St. 2d 344.]

Criminal law—Absent witness—Admissibility of preliminary hearing testimony at later trial—R. C. 2945.49 construed.

(No. 78-437—Decided June 13, 1978.)

APPEAL from the Court of Appeals for Hamilton County.

Ricardo Smith was arrested for rape, at 5:45 a.m. on September 5, 1976, after being found with Carolyn Coffman under circumstances indicating that a rape may have taken place. At a preliminary hearing held in the Hamilton County Municipal Court on September 10, 1976, Carolyn Coffman testified and was cross-examined briefly by Smith's appointed counsel. At jury trial in the Court of Common Pleas, the state, over objection of defendant, introduced the preliminary hearing testimony of Coffman* after stating

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* The proceedings at the preliminary hearing were as follows:
"Mr. DiPuccio: Ricardo Smith. Swear in the witnesses.
"(Witnesses sworn.)
"CAROLYN COFFMAN a witness herein, called on behalf of the plaintiff, having previously been sworn, testified as follows:
"DIRECT EXAMINATION
"BY MR. DiPUCCIO:
"Q. State your name.
"A. Carolyn Coffman.
"Q. On September 5th, 1976, did you see the defendant, Ricardo Smith?
"A. Yes, I did.
"Q. If you see him in Court today, point to him please, if you can?

that Coffman was unavailable and informally relating unsuccessful attempts of the police to locate her.

"A. Right, standing over there (indicating).
"Q. What happened on September the 5th?
"A. Well, I was getting out of my car going up to my apartment and he came out from some bushes and grabbed me, and he started pulling on me and pulling me down. He pulled me down behind this school and forced me to do some awful things to him.
"Q. Okay. Tell us what occurred behind the school? You'll have to tell us exactly what happened.
"The Court: I know it's embarrassing, ma'am, but you do have to relate the facts.
"A. He made me stick—put my mouth on his penis and then he got on top of me and stuck his penis in my vagina.
"Mr. DiPuccio: Okay. Your witness.
"CROSS-EXAMINATION
"BY MR. LANDEN:
"Q. Ma'am, what time of the day was this?
"A. It was around 8:30 at night.
"Q. Was there anyone else present at the scene?
"A. No, there wasn't.
"Q. Okay. No other persons were there?
"A. No.
"Q. Now, did Mr.—did the defendant—was there any use of any weapon?
"A. Yes, there was.
"Q. What was that?
"A. It was a black looking thing and it was sharp.
"Q. Was it a knife, or was it as a club or what was it?
"A. I don't know, but I just know it was sharp because he said if I didn't do what he said that he would cut my throat.
"Q. Okay. Did you make any screams.
"A. Yes, I did.
"Q. And how far—where were you in relation to the apartment when you first saw the gentleman?
"A. I was getting out of my car.
"Q. How far—was this apartment right next to the street?
"A. It was right behind my house in the parking lot.
"Q. Do you live in an apartment or is it—
"A. Yeah, I was living there.
"Q. Okay. Had you ever seen this gentleman before?
"A. No, I haven't.
"Mr. Landen: I have no further questions.
"Mr. DiPuccio: Thank you, ma'am, you may step down. Okay, Officers."
"(End of the testimony.)"

Smith denied that he had raped Coffman, but testified that Coffman picked him up at a White Castle restaurant earlier in the evening and that she had initiated and consented to their later sexual activities. Smith's testimony was in part corroborated by a former security agent at a White Castle restaurant who testified he had seen Coffman and Smith amicably leave the restaurant in her car prior to the alleged rape.

The state introduced police and medical testimony of Coffman's physical condition when found with defendant, all of which tended to indicate that it was highly unlikely that the sexual conduct was voluntary.

Defendant was found guilty as charged and sentenced to a term of years. Upon appeal, the Court of Appeals affirmed.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

Mr. Simon L. Leis, Jr., prosecuting attorney, *Mr. Leonard Kirschner, Mr. Thomas P. Longano* and *Mr. Joseph G. Carr,* for appellee.

Mr. Robert L. Gensler, for appellant.

Per Curiam. Appellant raises two objections to the use of the preliminary hearing testimony of Coffman: (1) the testimony is precluded by the confrontation clause of the Sixth Amendment to the United States Constitution; and (2) the testimony is not admissible because the witness was not proved to be unavailable to testify at the trial.

We have recently held in *State* v. *Roberts* (1978), 55 Ohio St. 2d 191, that the testimony under oath of a material witness at the preliminary hearing may not be used against a defendant at the trial where there was no cross-examination at the preliminary hearing, despite the fact that the witness is proved to be unavailable to testify at the trial. The use of such testimony was held to violate the

Sixth Amendment to the United States Constitution. *Roberts* left open the question of whether the preliminary hearing testimony of an unavailable witness is precluded by the Sixth Amendment when counsel for defendant cross-examines the witness at the preliminary hearing. Citing *California* v. *Green* (1970), 399 U.S. 149, the writer intimated that adequate cross-examination may satisfy the confrontation clause of the Sixth Amendment and make the testimony admissible at a later trial.

The principle set forth by the court in *Roberts* is fully applicable to this cause. At all events, the cross-examination by assigned counsel at the preliminary hearing five days after the arrest was of no more value than no cross-examination at all. There was no meaningful cross-examination of Coffman concerning where she first met defendant or of the particulars surrounding consent or lack thereof. As Chief Justice O'Neill stated in *Roberts,* the issue at the preliminary hearing differs greatly from that at trial. Counsel has little, if any, opportunity to effectively cross-examine a witness about the details that tend to indicate whether the witness is telling the truth. It would make little sense to hold that brief, unprepared cross-examination at the preliminary hearing meets Sixth Amendment standards while the total lack of cross-examination does not. One consequence of such distinction would be that defense counsel would be forced to either waive cross-examination entirely at the preliminary hearing or to insist upon an opportunity to cross-examine at great length.

Thus, the *Roberts'* rule includes preclusion of an unavailable witness' testimony at the preliminary hearing where the record shows that the witness was cross-examined only briefly and ineffectively.

The state also failed to establish that Coffman was unavailable to testify at trial. Prior to the commencement of

the trial on December 3, 1976, defense counsel specifically raised the question of the availability of the prosecuting witness to testify, being concerned with the possibility of the use of the witness' recorded testimony pursuant to R. C. 2945.49. He pointed out that the trial was originally set for November 29, and continued until December 3, for the reason that the prosecuting witness was not present on November 29, 1976. (That fact is not otherwise established in the record.) The court requested the prosecutor to clarify the situation. The prosecutor stated that a subpoena had been issued for Coffman for November 29, and that she did not show up. He said that he had had "Cincinnati police officers * * * and other individuals looking for her," that they had gone to her address, and that she did not live at the address where she said she lived during grand jury testimony, or at her prior address. He said further that they had been unable to locate her; he argued that the state could use her testimony if she was unavailable for any reason, concluding that "I don't know why this girl is not here today, but it could be for a good reason as equally as it could be for a bad one." After further argument by defendant concerning the fact that a subpoena was not issued to compel Coffman's presence on December 3, the trial court concluded that it was satisfied that the prosecutor had made an effort to have her at trial and that she was unavailable within the purview of R. C. 2945.49. There was no sworn testimony as to efforts made by the state to secure her presence at the trial and obviously the prosecutor was relying primarily on hearsay information concerning attempts to find her, the prosecutor not having conducted the search personally.

The Court of Appeals held in effect that the defendant waived any right to have the state establish the unavailability of the witness by proper testimony, rather than hearsay statements not under oath by the prosecutor, by failure

to specifically request that the prosecutor's statements be substantiated by witnesses under oath subject to cross-examination.

The right to cross-examine and confront a key prosecution witness at trial is an important constitutional right that is subject to express rather than implied waiver. To show unavailability, the state has the burden of proving that by diligence the witness' attendance could not have been procured. See *State* v. *Roberts, supra,* at page 195. The evidence produced by the state must be based on the personal knowledge of witnesses rather than upon hearsay not under oath, at least when unavailability has not been clearly conceded by defendant. The record does not show that defense counsel ever agreed that the state had shown that the witness was unavailable or that the state was diligent in attempting to locate her. In fact, the concluding remark of the prosecutor indicates that her reason for not attending the trial may have been "a bad one." Use of Coffman's preliminary hearing testimony in lieu of her attendance, confrontation, and cross-examination at trial was improper as her credibility, as yet not properly tested in the adversary system, was so crucial to the outcome. If her absence was for an improper reason, a real injustice may have occurred by use of the preliminary hearing testimony.

The state failed to prove that the prosecuting witness was unavailable and could not be produced at trial by diligent effort; thus, the state did not lay a proper foundation for using her preliminary hearing testimony pursuant to R. C. 2945.49.

Although the state produced sufficient evidence without Coffman's testimony to find defendant guilty of rape beyond a reasonable doubt, the error in admitting the preliminary hearing testimony of Coffman is not harmless. The bene-

ficiary of a federal constitutional error must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained in order for the error to be harmless. *Chapman* v. *California* (1967), 386 U. S. 18. Harmless error has not been shown beyond a reasonable doubt in this cause, as the testimony of the absent witness was quite important to the state upon the crucial issue of consent.

The judgment of the Court of Appeals is reversed and the cause is remanded for a new trial consistent with this decision.

Judgment reversed and cause remanded.

W. BROWN, P. BROWN, SWEENEY and MCCORMAC, JJ., concur.

CELEBREZZE, C. J., HERBERT and HOLMES, JJ., dissent for the reasons stated in the dissenting opinion of CELEBREZZE, J., in *State* v. *Roberts* (1978), 55 Ohio St. 2d 191, 199.

MCCORMAC, J., of the Tenth Appellate District sitting for LOCHER, J.

APPENDIX C

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-77095

STATE OF OHIO,
Plaintiff-Appellee,

vs.

RICARDO SMITH,
Defendant-Appellant.

MEMORANDUM DECISION
AND
JUDGMENT ENTRY

(Filed February 8, 1978)

Messrs. Simon L. Leis, Jr., Thomas P. Longano and Joseph G. Carr, 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Robert L. Gensler, 711 Gwynne Building, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the arguments of counsel.

Now, therefore, the assignments of error having been fully considered are accordingly passed upon in conformity with App. R. 12 (A) as follows:

The defendant-appellant was charged with and, following a jury trial, was convicted of rape contrary to R. C. 2907.02, and was thereafter sentenced as appears of record. This appeal was timely brought, presenting two assignments of error for review.

The defendant, in his first assignment, asserts that the trial court erred in admitting into evidence the recorded testimony of the prosecuting witness, taken at the defendant's preliminary hearing, without first requiring the state to demonstrate that it had made a good faith effort to obtain the witness' presence at trial. We disagree. R. C. 2945.49 provides, in pertinent part, that:

> Testimony taken at an examination or preliminary hearing at which the defendant is present . . . may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial. . . .

In the instant case, the trial court permitted the introduction of the complaining witness' recorded testimony into evidence after having been informed by the prosecutor that repeated efforts to locate and compel the appearance of the witness by various Cincinnati law enforcement officers had proved fruitless. Counsel for the defendant, while voicing a general objection to the introduction of the recorded testimony, made no attempt to controvert the

truth of the prosecutor's representations, and asserted no demand for an evidentiary hearing wherein the state would have been required to substantiate, by the sworn testimony of the officers in question, its claim that the witness was unavailable for trial. Thus, we are not confronted with, and we do not decide, the case where defendant's counsel interposes an objection to a prosecutor's bald recital of facts intended to justify the introduction of recorded testimony pursuant to R. C. 2945.49, and demands proof of such facts in an evidentiary proceeding. In the case before us, the unchallenged statements of the prosecutor afforded the trial court a sufficient basis for its determination that the complaining witness was unavailable for trial within the meaning of R. C. 2945.49, and that her recorded testimony was, therefore, admissible against the defendant. See *State* v. *Gaines* (1st Dist. 1974), 40 Ohio App. 2d 224. The first assignment of error is accordingly overruled.

The defendant's second assignment of error claims that the trial court erred in denying his motion for acquittal made at the close of the state's case pursuant to Crim. R. 29 (A). However, the record reflects that after the trial court overruled the defendant's motion, the defendant elected to proceed with the trial and to offer evidence on his behalf, thus waiving any error which might have attended the trial court's overruling of the motion for acquittal. See *State* v. *Wilson,* No. C-76131 (1st Dist. March 2, 1977); *State* v. *Durham,* No. C-74614 (1st Dist. April 12, 1976). The second assignment of error is overruled.

All assignments of error properly before this Court having been ruled upon as heretofore set forth, it is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

PALMER, P. J., BETTMAN and CASTLE, J. J.